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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, *Petitioner*,

v.

ANTHONY CORNELL BEAN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do federalism concerns apply in a habeas corpus action brought under 28 U.S.C. section 2254 so that a federal court must honor a State's sovereign authority to create and apply its own neutral discretionary rules of procedure, rendering a federal claim forfeited, as long as the State's invocation of the rule does not evade or is not pre-empted by federal law?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

ARTHUR CALDERON, *Petitioner*,

v.

ANTHONY CORNELL BEAN, *Respondent*.

Arthur Calderon, Warden of California State Prison at San Quentin, ("the warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as 96 F.3d 1126 (9th Cir. 1996), denying petitioner's petition for a writ of mandamus. A copy of that decision is attached as Appendix B to this petition for writ of certiorari. The order of the United States District Court for the Eastern District of California that denied petitioner's motion for summary dismissal is unreported and is reproduced and attached as Appendix D.

STATEMENT OF JURISDICTION

The warden timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States Court of Appeals for the

Ninth Circuit was entered on September 30, 1996. The petition for rehearing was denied on November 25, 1996.

CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; any thing in the Constitution or law of any state to the contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On July 20, 1981, respondent Bean ("Bean") was sentenced to death upon his conviction for the murder of Beth Schatz, and he was sentenced to state prison for a term of life without the possibility of parole for the murder of Eileen Fox.

On September 19, 1988, the California Supreme Court affirmed the conviction in Bean's appeal in *People v. Bean,* 46 Cal.3d 919 (1988).

On April 24, 1989, Bean filed a petition for writ of certiorari in the United States Supreme Court. Petitioner's petition was denied on March 19, 1990, by the United States Supreme Court.

On June 4, 1990, Bean acting in propria persona, filed a request for appointment of counsel in the United States District Court for the Eastern District of California. On July 26, 1990, counsel was appointed to represent Bean. On July 18, 1991, counsel for Bean filed a federal petition for writ of habeas corpus.

On July 30, 1991, the State filed a motion for summary adjudication which alleged that the petition contained unexhausted claims.

On September 26, 1991, the United States District Court for the Eastern District of California ordered that Bean exhaust all unexhausted claims and ordered petitioner's execution stayed.

On October 31, 1991, counsel was appointed by the California Supreme Court for purposes of filing Bean's writ for state habeas corpus.

On July 23, 1993, the California Supreme court issued its decision in *In re Clark,* 5 Cal.4th 750 (1993). Without explanation, Bean waited until June 1, 1994, to file his first and only petition for writ of habeas corpus in the California Supreme Court.

On June 6, 1994, the California Supreme Court requested the State to file an informal response to the above-referenced petition.

On February 23, 1995, the California Supreme Court denied Bean's petition for writ of habeas corpus[1] as follows:

> The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which [Bean] lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in the investigating and presenting the claims. *In re Clark, supra,* 5 Cal.4th 750, 774-775.

The California Supreme Court *also* specifically addressed numerous issues as ". . . procedurally barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial." *In re Harris*, 5 Cal.4th 813, 826 (1993); *In re Clark, supra,* 5 Cal.4th 750, 765; *In re Waltreus,* 62 Cal.2d 218, 225 (1965). *See also, People v. Bean, supra,* 46 Cal.3d 919.

Lastly, the California Supreme Court addressed several issues noting that they had ". . . been considered on their merits, *see In re Clark, supra,* 5 Cal.4th 750, 797-798, but, in light of the record of the trial and related proceedings, failed to state a prima facie case entitling [Bean] to relief."

Bean filed a federal petition for writ of habeas corpus on or about March 22, 1995.

On July 21, 1995, the State filed a motion to dismiss Bean's petition urging that his contentions had

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1. The California Supreme Court's decision is attached to this petition as Appendix A.

been procedurally defaulted in state court as untimely. (Additionally, the State argued that specific claims were procedurally barred as articulated by the California Supreme Court above.)

On November 17, 1995, the magistrate judge, pursuant to a referral by the respondent district court under 28 U.S.C. section 636, subdivision (b)(1)(B), and Local General Order No. 262, filed Findings and Recommendations (hereinafter "F and R"), wherein the magistrate judge denied the motion by petitioner herein, to dismiss all 52 claims of Bean, based on independent and adequate state procedural bars. A copy of these findings is attached hereto as Appendix C and is incorporated by reference herein.

In his "Findings and Recommendations," filed November 17, 1995, the magistrate judge refused to apply *Clark* or *Harris* to Bean's state habeas petition even though it was filed subsequent to both decisions, finding instead that neither case was the law at the time Bean should have raised his claims, "i.e., within a reasonable time after the final date of *Stankewitz*[2] [January 16, 1986], *Clark* was not the law." F&R p. 8, fn. omitted.

On March 29, 1996, the respondent district court, over the State of California's objections, filed an order adopting the magistrate judge's Findings in their entirety and denying the State's motion to dismiss. Appendix D.

On July 18, 1996, petitioner filed a petition for writ of mandate and/or prohibition in the Ninth Circuit Court of Appeals. In an opinion filed on September 30, 1996, the court of appeals denied the petition. *Calderon v. United States District Court for the Eastern District of*

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2. *In re Stankewitz*, 40 Cal.3d 391 (1985).

California (Bean), 96 F.3d 1126 (9th Cir. 1996). On November 26, 1996, petitioner's petition for rehearing was denied.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case involves Bean's default of approximately 52 constitutional claims that were first brought on state collateral attack approximately 13 years after his judgment of conviction and more than five and one-half years after the California Supreme Court decided his direct appeal. These facts present the Court with a substantial question of national importance by requiring the Court to define for the very first time in a federal habeas setting the amount of deference a federal court must give a State's invocation of a procedural bar in recognition of the State sovereign power to create and invoke its own neutral rules of procedure. The Court has never before been called upon to decide whether the principles of comity and federalism affect either the nature or the application of the adequate state ground test in an action filed under 28 U.S.C. section 2254.

In this case, Bean's automatic appeal from his 1981 conviction became final in 1988, four years prior to the California Supreme Court's decisions reaffirming California's well established timeliness procedural bars. *In re Clark, supra*, 5 Cal.4th 750; *In re Harris, supra,* 5 Cal.4th 813. These decisions by the California Supreme Court predated Bean's 1994 state habeas petition by more than 10 months. Additionally, well before the *Clark* opinion was issued and *Clark* served to reaffirm that notice, Bean was on notice that he was required to justify any delay, and he failed to adequately do so.

Certiorari should be granted because adoption of the evasion or pre-emption formulation of the

adequate state ground doctrine is necessary (1) to afford sufficient deference to California's sovereign right under the Tenth Amendment of the Constitution to create and invoke timeliness rules that apply to state collateral attacks on death penalty judgments, (2) to afford sufficient deference to the federalism and comity concerns unique to habeas corpus cases under 28 U.S.C. section 2254, and (3) to make the Ninth Circuit Court of Appeals decision consistent with the Court's cases regarding "firmly established" and "strict" and "regular" enforcement of state rules. This case presents an important question of federal law affecting the most basic aspects of federalism, a question up to now unresolved by this Court, with especially far-reaching impact in collateral attacks on state death penalty judgments.

ARGUMENT

I.

THE OPINION IN CALDERON V. U.S. DISTRICT COURT FOR EASTERN DISTRICT OF CALIFORNIA, SUPRA, 96 F.3D 1126, CONFLICTS WITH AND MISAPPLIES NINTH CIRCUIT PRECEDENT ON AN IMPORTANT QUESTION OF FEDERAL LAW

A case is appropriate for review on certiorari "[w]hen a United States court of appeal has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . ." Supreme Court Rule 10.1. The present case is an example of such a conflict.

Balancing the need for finality against the need to correct fundamental injustices, this Court has determined that a habeas petitioner seeking to raise a defaulted claim in federal court must show "cause" for the default. *See Francis v. Henderson,* 425 U.S. 536, 542 (1976). Not surprisingly, many state courts and legislatures have come to similar conclusions. Hence, California requires a showing of "good cause' for an untimely petition, *see Morales v. Calderon,* 85 F.3d 1387, 1390 (9th Cir. 1996) (quoting Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standard 1-2 (1989)).

The lower court denied petitioner's motion to dismiss based on the conclusion that there were not adequate and independent grounds to preclude federal review because, inter alia, California's timeliness bar was not sufficiently clear at the time of Bean's "purported default." In *Calderon v. United States District Court,*

Eastern District of California (Bean), supra, 96 F.3d 1126, the court of appeals upheld the lower court order.

The opinion in *Calderon v. United States District Court, Eastern District of California (Bean), supra,* directly contradicts California's clear consistent application of the timeliness requirements and ignores the recent Ninth Circuit opinion in *Woratzeck v. Stewart*, 97 F.3d 329 (9th Cir. 1996). Moreover, the Ninth Circuit Court's opinion is based entirely on the unreliable and unproven factual premise that the California Supreme Court did not regularly and routinely apply its timeliness requirement prior to the opinion in *Clark.* This factual predicate to the rejection of California's timeliness bar originated as an unproven observation in *Karis*[3] and has evolved into an accepted part of the myth.

Woratzeck* v. *Stewart

In *Woratzeck v. Stewart, supra*, 97 F.3d 329, the petitioner argued that the Arizona "especially heinous, cruel or depraved" aggravating factor was unconstitutionally vague. Although the Arizona Supreme Court explained the interpretation of that factor in *State v. Gretzler*, 659 P.2d 1, cert. denied 461 U.S. 971, (1983), that decision came after Woratzeck's appeal. Woratzeck argued that the adequate narrowing interpretation discussed in *Gretzler* could not have been applied in his case.

The Arizona Supreme Court, however, explained in subsequent cases that "Gretzler did not present a new, narrower interpretation of the . . . factor, but simply a digest of the previously legitimate applications of the factor." *Woratzeck v. Stewart, supra*, 97 F.3d 329 at 333, citation deleted.

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3. *Karis v. Vasquez,* 828 F. Supp. 1449, 1463-1464 (E.D. 1993).

Accordingly, the Ninth Circuit held that *Gretzler* did not change the law but merely summarized and clarified how that aggravating factor had been applied in the past. *Ibid.* Similarly, petitioner respectfully submits that *Clark* expressly held that the rule announced in that decision did not represent a change in the California Supreme Court's application of the timeliness bar, but simply a clarification of how the Court viewed those bars and how it had consistently applied them in the past.

II.

CALIFORNIA'S TIMELINESS REQUIREMENTS HAVE BEEN CONSISTENTLY APPLIED PRIOR TO *CLARK*, AND *CLARK*'S RESTATEMENT OF ESTABLISHED LAW SHOULD NOT BE USED TO UNDERMINE THE VALIDITY OF STATE COURT DETERMINATIONS[4/]

The California courts have consistently held that a habeas petitioner must assert all claims known to him in a timely manner, and that a petitioner must fully explain and justify any substantial delay in asserting known claims. *In re Clark*, *supra*, 5 Cal.4th at p. 783; *In re Stankewitz, supra*, 40 Cal.3d 391, 396, n. 1; *In re Walker*, 10 Cal.3d 764, 774 (1974). In June of 1989, the California Supreme Court published a detailed set of guidelines pertaining to the timeliness requirements applicable to habeas petitioners in capital cases, entitled 'Supreme Court Policies Regarding Cases Arising From Judgments of Death,' (hereinafter 'the Policies.')

The Ninth Circuit made clear in *Paradis v. Arave*, 954 F.2d 1483 (9th Cir. 1992) that, in evaluating the adequacy of state procedural bars, federal courts must focus on the particular procedural bar invoked in the case at hand. The fact that one particular state procedural bar may be subject to attack on the ground it has been inconsistently or irregularly applied does not justify the inference that a different state procedural bar has also been inconsistently or irregularly applied. *Id.* at 1493.

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4. In a decision filed June 4, 1996, the Ninth Circuit concluded that the application of the pre-*Clark* timeliness bar was not adequate. *Morales v. Calderon, supra*, 85 F.3d 1387.

Any determination of the adequacy of California procedural bars, including the separate timeliness bar, requires a close examination of *Clark*. The California Supreme Court in *Clark* gave its most recent and complete analysis of state procedural bars to petitions for writ of habeas corpus. The court examined, separately, both the successive petitions bar and the timeliness bar. First, the court reviewed the history and application of California's procedural bar to the filing of successive petitions. *In re Clark*, *supra*, 5 Cal.4th at 767-782. The court candidly admitted:

> Our past decisions have thereby suggested that the rules *against piecemeal presentation of claims* and repetitious petitions are subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice.
> Emphasis added; *id.* at 768.

However, it is important to understand that the quoted language is found in the section of the state court opinion entitled "Repetitious and piecemeal claims" (*In re Clark*, *supra*, 5 Cal.4th at 767), which limited itself to a discussion of California's two longstanding rules against repeated applications for relief on previously rejected claims and against piecemeal presentation of habeas claims. The California Supreme Court made additional assertions under the separate section entitled "Delay." There the state court observed, "*Our decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim.* [Citation omitted.]" *In re Clark*, *supra*, at 783; emphasis added. The court in *Clark* expressly observed that:

> Even before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed *was on notice* that any substantial delay in filing a petition after the grounds became known had to be justified. *In re Stankewitz*, 40 Cal.3d 391, 396, fn. 1 (1985). Emphasis added; *Id.* at 782.

Moreover, the court did not suggest that the publication of the Policies, or its decision in *Clark*, altered the court's longstanding approach to the timeliness bar. The Policies merely set forth a presumption of timeliness and referred directly to *Stankewitz* as the appropriate standard for assessing timeliness. *In re Clark*, *supra*, at 783. Consequently, the court rejected petitioner's claim that the Policies changed any preexisting timeliness requirements. *Id.* at 785. To the extent the Policies did add a duty to counsel to investigate possible claims, the California court also allowed a petitioner to present claims discovered as a result of investigation commenced promptly after the Policies became effective on June 6, 1989. *Ibid.*

Petitioner submits that, *if* the California Supreme Court's admission of inconsistent application of the bar against successive petitions is accepted without question or analysis, so too should its consistent requirement that substantially delayed claims be justified be acknowledged.

Petitioner urges this Court to refuse to blur the distinction between the successive petitions bar and the timeliness bar. Even assuming the successive petitions bar, prior to the court's decision in *Clark*, would not have been an adequate state procedural bar to preclude federal review, the timeliness bar is not subject to the same analysis. The timeliness bar in California is longstanding; the Policies predated petitioner's state

habeas petition by almost five years; the court's ruling in *Clark* predated petitioner's state habeas petition by 10 months; well before the *Clark* opinion was issued and Clark served to reaffirm that notice, petitioner was on notice that he was required to justify any delay, and he failed to adequately do so. Application of the timeliness bar was not infrequently, unexpectedly, or freakishly applied to petitioner. *See Johnson v. Mississippi*, 486 U.S. 578, 587-589 (1988).

Thus, the California Supreme Court's holding in *Clark* did not indicate that its prior holdings with respect to the timeliness bar were inconsistently applied. And, importantly in the instant case, the California courts have always required that a petitioner justify any substantial delay in filing a habeas petition. Bean, in the instant case, has failed to justify the delay in presenting his new claims against his capital murder conviction.

III.

THE NINTH CIRCUIT ERRONEOUSLY DETERMINED THAT THE INSTANT CASE WAS A "PRE-CLARK" MATTER

Significantly, the opinion of the court of appeals declines to determine "whether Clark sufficiently clarified California's timeliness requirements." *Calderon v. United States District Court, Eastern District of California (Bean), supra,* 96 F.3d 1126, 1130. Petitioner respectfully submits that the decision of the California Supreme Court specifically relying upon *Clark* cannot logically be deemed an application of a pre-*Clark* rule. *Calderon's* holding that the "purported procedural default" occurred pre-*Clark* is, in effect, a holding that the imposition of *Clark* as a timeliness bar in this case acted as a statute of limitations that expired pre-*Clark.*[5]

However, *Clark* directly refutes this point of view. In framing the issue under review as when the Court should review the merits of an untimely or successive petition, *In re Clark,* 5 Cal.4th at 795, the California Supreme Court was careful to point out that it was not taking the "unprecedented" action of creating a "'statute of limitations' for habeas corpus petitioner," finding "no such limitation has been imposed or is

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5. The finding that the "purported default" under the delay rule must have been pre-*Clark* is also inconsistent with the conclusion in *Morales v. Calderon, supra,* 85 F.3d 1387, that the delay rule is substantively standardless because it does not define what amount of delay is substantial, and therefore did not give "adequate notice of when his claims would be barred." *Morales v. Calderon,* 85 F.3d at 1391, 1393. If this is true, it is inconsistent for the court in *Calderon v. United Stated District Court, Eastern District of California (Bean),* to be able to determine that the default herein must have occurred pre-*Clark.* In noting this inconsistency, petitioner in no way concedes that *Morales* was correctly decided.

contemplated." *Id.*, at fn. 30. As the court explained: "We do no more than apply the well-established rule that any substantial delay in seeking relief by petition for writ of habeas corpus must be explained and justified." *Id.*

Morales v. Calderon, supra, 85 F.3d 1387, held that California's substantial delay rule is inadequate because it was "'standardless both substantively and as to duration'" and "did not provide petitioner with adequate notice of when his claims would be barred." *Id.*, at p. 1393. *Morales* also specifically identified that one of the vagueness problems with California's timeliness rules is that "[n]either the [Supreme Court Policies] Standards nor [the substantial delay rule under] *Stankewitz* . . . established what amount of delay the court would consider 'substantial.'" *Id.*, at p. 1391.

In contrast to *Morales*, respondent submits that the instant case involves a purely post-*Clark* situation. Accordingly, California's delay rule articulated in *Clark* is similar to and should be accorded the same recognition as the federal delay rule.

In *Francis v. Henderson, supra,* 425 U.S. 536 (1976), the Court found "'no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.'" *Francis v. Henderson, supra,* 425 U.S. at 542. The Ninth Circuit's opinion in this case calls upon the Court now to decide whether there is any reason to give greater preclusive effect to the federal delay rule, found in Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts, than to the two California delay rules invoked in this case by the California Supreme Court.

The Ninth Circuit's finding of inadequacy is based on its subjective view that the substantive elements of California's timeliness bars failed to give *Morales* "adequate notice of when his claims would be barred."

Morales v. Calderon, supra, 85 F.3d at 1393. This is because, in the Court's view, "[n]either the Standards [found in the California Supreme Court Policies] nor Stankewitz['s substantial delay rule] . . . established what amount of delay the court would consider 'substantial' . . . ." *Id.,* at p. 1391.

Rule 9's prohibition of delayed petitions likewise fails to give Bean any "notice of when his claims would be barred" and fails to establish "what amount of delay' is prohibited in federal court. However, a federal court is nonetheless bound to apply the rule and cannot read into the rule its own ad hoc "equitable" concerns of "fair" or "adequate" notice not found in the rule itself. *Lonchar v. Thomas,* 517 U.S. ___, 134 L.Ed. 2d 440 (1996). Thus, this case calls upon the Court to decide whether a federal court may disregard a state's delay rules based on its own "equitable" concerns of "fair" or "adequate" notice not found in the state rules themselves where it would be prohibited from ignoring the federal delay rule based on its own "equitable" concerns of "fair" or "adequate" notice not found in the rule itself.

Petitioner respectfully submits that *In re Clark* is of no substantial difference than *McCleskey v. Zant,* 499 U.S. 467 (1991), where the Supreme Court clarified its abuse of the writ standard, and then applied it retroactively to all cases, including McCleskey's. Indeed federal courts routinely apply judicial pronouncements concerning new habeas rules retroactively. *Coleman v. Thompson,* 501 U.S. 722 (1991) (stricter cause requirements for procedural default announced and applied); *Brecht v. Abrahamson,* 507 U.S. 619 (1993) (relaxed harmless-error rule announced and applied to defeat habeas petition); *Teague v. Lane,* 489 U.S. 288 (1989) (habeas court may not announce or apply intervening new rules for petitioner's benefit).

The Supreme Court has created the pipeline retroactivity rule for judicial decisions in both criminal and civil cases, in part, because it would be an improper exercise of judicial power to engage in prospective judicial decision-making. *See Griffiths v. Kentucky,* 479 U.S. 314, 322, 328 (1987); *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 97 (1993). Thus, the Ninth Circuit has imposed on California, for reasons of "fair notice," *see Morales,* 85 F.3d at 1390, exactly the rule that it could not apply to the new or modified rules announced in *McCleskey, Coleman, Brecht,* or *Teague.*

Under the federal rule, whatever reliance interest the losing party has in the previously existing rule is not sufficient to prevent the application of the new or modified rule to his case. "In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Harper,* 509 U.S. at 97.[6] The "purported default" in *McCleskey* occurred in his prior petition and he undoubtedly relied on the old law in bringing his subsequent and prohibited petition. Thus, the Ninth Circuit's analysis in *Calderon v. United States*

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6. Indeed, the case presents the converse of the situation in *Harper.* There, the Supreme Court held that the state court could not impose a more lenient interpretation of the judicial retroactivity doctrine as to *federal* law, but that it was free to impose a more lenient judicial retroactivity doctrine in applying its own *state* law decisions. 509 U.S. at 100. Here, the Ninth Circuit held that the California Supreme Court could not impose a stricter judicial retroactivity doctrine as to *state* law. Petitioner contends that federalism precepts should prevent the Ninth Circuit from doing this where the Ninth Circuit was not free to impose a more lenient judicial retroactivity doctrine as to *federal* law.

District Court, Eastern District of California (Bean),supra, is contrary to the analysis in *McCleskey.*

Petitioner respectfully submits that the court in *Calderon v. United States District Court, Eastern District of California (Bean), supra,* 96 F.3d 1126, improperly separated the delay rule into questions that separately evaluate the part of the rule requiring "substantial" delay from the part of the rule that requires an explanation or justification for the delay itself. These requirements are opposite sides of the same coin because the rule requires an explanation that advises the court when the petitioner first became aware of the predicate facts of the claim. Under this rule, a California court simply cannot evaluate if there is any substantial delay when, as here, the petitioner "does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims." *Id.,* at p. 1128.

State regulation of its habeas corpus procedural rules, is "essential to the primary governmental functions of administering justice," *Bates v. State Bar of Arizona,* 433 U.S. 350, 3671 (1977), and therefore should be "one of the attributes of sovereignty . . . enjoyed by the government of every State of the Union." Hamilton, The Federalist, No. 81. It is as a basic sovereign right, for example, as the sovereign function of regulating the practice of law within the state, and should only yield where it is pre-empted by federal law. *See Sperry v. Florida ex rel. Florida Bar,* 373 U.S. 379 (1963). (State Supreme Court rules prohibiting non-lawyers from practicing law within the state pre-empted by federal law that allows non-lawyers to practice patent law.)

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar

Dated: February 18, 1997.

Respectfully submitted,

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